Paper No. 18

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE BOARD OF PATENT APPEALS
AND INTERFERENCES

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Ex parte ROBERT H. MOFFETT

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Appeal No.2003-1274
Application No. 09/802,712

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ON BRIEF

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Before KIMLIN, KRATZ and PAWLIKOWSKI, Administrative Patent Judges.
KRATZ, Administrative Patent Judge.

ON REQUEST FOR REHEARING

This is in response to appellant's request for rehearing of our decision mailed August 19, 2003, wherein we affirmed the examiner's decision to reject claims 1, 3, 4, 9 and 14 under 35 U.S.C. § 103(a) as being unpatentable over Davis in view of Chung and to reject claims 10 and 16 under 35 U.S.C. § 103(a) as being unpatentable over Davis in view of Chung and Keys.

Appellant maintains that there are incorrect statements at page 4 of our decision. One of the alleged incorrect statements relates to the examiner's findings concerning Davis, including the finding of a disclosure of the addition of a flocculant to a second pH adjusted stream in Davis and our observation that appellant did not dispute those findings. The other alleged incorrect statement is concerned with the disclosure of a preferred anionic acrylamide polymer flocculant in Davis and our observation of appellant's notation of such disclosure.

As to the first of the alleged incorrect statements, appellant seemingly suggests, in the request, that Davis does not disclose adding a flocculant to the second pH adjusted stream. We can not agree. Davis (column 1, line 49 through column 2, line 2) suggests "further processing with suitable flocculating agents" after a pH readjusting (second pH adjusting) step.

Concerning the second of the alleged incorrect statements about a preferred anionic acrylamide flocculant, we note that Davis (column 2, lines 3-6) describes "flocculating agents I prefer to use in the practice of my invention comprise a group of anionic acrylamide polymers . . . ." Appellant may be correct that Davis does not explicitly mention a cationic polyacrylamide for comparison; however, Davis does describe "suitable

flocculating agents" (column 1, lines 59 and 60) and a preferred group of anionic acrylamides.[1] Thus, we find no significant substantive error in our statements at page 4 of the decision.

We are not persuaded by appellant's allegation that the Board overlooked a lack of nexus between Davis and Chung for the reasons stated at pages 5 through 7 of our decision. We observe that the request is accompanied by a copy of Chapter 16 of the Handbook of Water-Soluble Gums and Resins, McGraw-Hill Book Company, Davidson (Editor) (1980) and new arguments based thereon. We will not consider any new arguments and/or new evidence which were not raised in the Brief. See 37 CFR § 1.192(a) (1997)("Any arguments or authorities not included in the brief will be refused consideration by the Board of Patent Appeals and Interferences, unless good cause is shown."). Appellant has not argued that there was good cause for presenting this evidence subsequent to the Board's decision.

[1] The "[a]s noted by appellant" phrase at page 4 of the decision is technically incorrect since appellant referred to the paragraph bridging columns 1 and 2 of Davis at page 4 of the brief whereas the term "prefer" appears in the first line of the paragraph that follows that bridging paragraph; i.e., at column 2, line 3 of Davis. A different outcome is not waranted by that harmless oversight.

As for appellant's speculative assumptions concerning cationic polymer sensitivity to acidic pH as set forth at page 2 of the request, we observe that the greater than 3 pH value of representative claim 1 includes acidic, neutral and basic pH's. It follows that such arguments are unpersuasive not only for their lack of supporting evidence but because the representative claim is not limited to a "still very acidic" pH. As the examiner explained in the answer, the initial pH of the food processing waste (from a poultry processing plant) that was treated in the example of Davis was 6.4. Since Chung does not adjust the pH of the food processing waste (from a chicken processing plant) therein, one of ordinary skill in the art would have reasonably expected that the pH of the waste that Chung treats with an anionic, non-ionic, cationic or amphoteric flocculant can include a pH above 3 and within the scope of the second adjusted pH (6 - 7.5) of Davis. Accordingly, we have and continue to agree with the examiner that Chung's teachings with respect to the interchangeableness of cationic and anionic flocculants would have been regarded as being prima facie obvious to apply in the pH range of interest in Davis by one of ordinary skill in the art since Chung evidences that the claimed cationic organic polymer was known in the art as a flocculating agent

useful for treating the type of materials that Davis treats. Moreover, as suggested at page 7 our decision, appellant's specification attaches no criticality to the choice of flocculating materials.

Nor do we agree with appellant's characterization of the prior art teachings as failing to suggest the functionality or effectiveness of a cationic organic polymer flocculant addition to a second pH adjusted waste stream as argued at page 4 of the request. This is so for the reasons set forth by the examiner in the answer and as we discussed in our decision and above. See pages 4-7 of our decision and pages 5 and 6 of the examiner's answer. Thus, we mantain our holding that one of ordinary skill in the art would have been led to modify the process of Davis based on the combined teachings of Davis and Chung by using another flocculant comprising a cationic organic polymer with a reasonable expectation of success in so doing.

Appellant's comments at page 5 of the request concerning our affirmance of the examiner's second § 103(a) rejection additionally relying on Keys have been considered. However, appellant's have not persuaded us of any error in our decision. A reading of the text following the Point 3 heading of the request (page 5), including the faulty comparative example

presented, makes plain the unsoundness of the arguments presented.

After reconsideration in light of appellant's request, we find that our decision is free of substantive factual and legal error, and we remain of the opinion that the claimed subject matter would have been obvious to one of ordinary skill in the art within the meaning of § 103(a) in view of the prior art cited by the examiner.

CONCLUSION

Appellant's request is granted to the extent we have reconsidered our decision, but is denied with respect to making any change therein.

No time period for taking any subquent action in connection with this appeal may be extended under 37 CFR 1.136(a)

Denied

EDWARD C. KIMLIN Administrative Patent Judge	)	
PETER F. KRATZ Administrative Patent Judge	)	BOARD OF PATENT APPEALS AND INTERFERENCES
BEVERLY PAWLIKOWSKI Administrative Patent Judge	)	

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